16

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~850.~~ 149

JAMES B. MURRAY, PLAINTIFF IN ERROR,

vs.

JANE S. DALLAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLNANIA.

FILED DECEMBER 7, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 350.

JAMES B. MURRAY, PLAINTIFF IN ERROR,

vs.

JANE S. DALLAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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Docket entries in sup. c't of Pa.

In the supreme court of Pennsylvania in and for the western district, No. 161. Oct. & Nov. term, 1870.

Acheson. Veech.

JAMES B. MURRAY, PL'FF IN ERROR, DEF'T below,
v.
JANE S. DALLAS.

Writ of error to the court of common pleas of Allegheny County, at No. 407, September term, 1870. Precipe, affidavit, and recognizance filed and writ issued.

Aug. 31, 1870. Rule to appear and plead at return of writ.

Oct. 24, 1870. Record returned and errors assigned.

November , 1870. Argued.

November 14, 1870. Judgment affirmed, opinion per curiam.

Nov. 17, 1870. Writ of error from U. S. S. C. & petition, bond, & citation filed.

From the record.

THO'S J. KEENAN,
Proth'y of Sup. C't of Penn'a, W. D.

3 *Docket entries in com. pleas of A'y Co.*

ALLEGHENY COUNTY, *ss:*

In the court of common pleas.

JANE S. DALLAS, ASSIGNEE OF WILLIAM W. Dallas and Louisa S. Dallas his wife,
v.
JAMES B. MURRAY.

Summons, debt, to 1st Monday of August, 1870.

Copy of bond and affidavit filed for $7,400 with interest from January 1st, 1870, in gold and silver coin.

Served July 12, 1870. Sh'ff F. $1 50.

July 25, 1870. Affidavit of defence filed.

Aug. 4, 1870. Rule to shew cause why judgment should not be entered for want of a sufficient affidavit of defence.

Reasons filed.

Same day, proof of notice to defendant's attorney filed.

Aug. 27, 1870. On argument list and rule absolute.

Same day, judgment against defendant sec. reg. for seven thousand six hundred and ninety-three $\frac{53}{100}$ dollars, payable in gold and silver coin of the U. S.

Sep. 2, 1870. Writ of error filed.

From the record.

[Signed] JACOB H. WALTER, *Pro.*

4 *Precipe, aff't, copies, & narr.*

In the court of common pleas of Allegheny County, of Sept. term, 1870.

JANE S. DALLAS, ASSIGNEE OF WILLIAM W. Dallas & Louisa S. Dallas his wife,
v.
JAMES B. MURRAY.

Issue summons debt ret'le 1st Monday August, 1870.

VEECH, WATSON & VEECH,
Att'ys for Pl'ff.

To J. H. WALTER, Esq.,
Proth'y.

JULY 11, 1870.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

George M. Dallas, agent in this behalf of Mrs. Jane S. Dallas, on his solemn oath, deposeth and saith that James B. Murray, of the city of Pittsburgh, Pa., is justly indebted to said Mrs. Jane S. Dallas in the sum of seven thousand and four hundred dollars, with lawful interest thereon from the first day of January, A. D. 1870, in, as deponent is ad-
5 vised, the gold and silver coin of the United States of America, of the weight and fineness and in the proportions of each of said kinds of coins fixed by the laws of said United States. Said indebtedness being for the principal sum and interest from January 1, 1870, (up to which date the interest has been paid,) due and unpaid on said James B. Murray's bond, bearing date, and made on, the 27th day of April, A. D. 1860, to said Louisa S. Dallas, in the sum of fourteen thousand dollars, conditoned to pay to her seven thousand four hundred dollars, on the first day of July, A. D. 1870, with interest thereon from the first day of July, A. D, 1860, at six per cent. per annum, payable half yearly; which bond was, by the said Louise S. Dallas and said W. W. Dallas, her husband, by writing, indorsed thereon, dated March 29th, 1862, under their hands and seals, before three credible witnesses, duly assigned to said Jane S. Dallas, and said assignment was by them duly acknowledged on April 11th, 1862; of which bond, condition, assignment, and acknowledgment true copies are hereto annexed and intended to
6 be herewith filed.

GEO. M. DALLAS.

Sworn to & subscribed, this 9th day of July, A. D. 1870, before me, an alderman in & for said city.

J. P. DELANCY.

Copy of bond.

Know all men by these presents that I, James B. Murray, of the city of Pittsburgh, State of Pennsylvania, am held and firmly bound unto Louise S. Dallas, of Carroll County, Maryland, in the sum of fourteen thousand dollars, to be paid to the said Louise S. Dallas, her certain attorney, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, and every of them firmly by these presents.

Witness my hand and seal the twenty-seventh day of April, in the year of our Lord, one thousand eight hundred and sixty.

The condition of the above obligation is such, that if the above-
7 bounden James B. Murray, his heirs, executors, administrators, and assigns, do well and truly pay or cause to be paid unto the said Louise S. Dallas, her certain attorney, heirs, executors, administrators, or assigns, the sum of seven thousand four hundred dollars on the first day of July, anno Domini eighteen hundred and seventy, with interest thereon from the first day of July, A. D. eighteen hundred and sixty, at six per cent. per annum, payable half yearly, without any fraud or further delay, then this obligation to be void; otherwise to be and remain in full force and virtue.

JA'S B. MURRAY. [SEAL.]

Sealed and delivered in presence of—
W'M M. LYON.

(Endorsed:)

"*Trevanion,*" *Carroll County, Maryland.*

For value received we do hereby assign, transfer, and set over unto Jane S. Dallas, her heirs, executors, administrators, and assigns, the within bond of James B. Murray for fourteen thousand dollars,
8 conditioned for the payment of the sum of seven thousand four hundred dollars.

Witness our hands and seals this 29th day of March, A. D. 1862.

W. W. DALLAS. [SEAL.]
LOUISE S. DALLAS. [SEAL.]

Witness:
KATE FORTNER,
JOSEPH A. ECKS,
DALRYMPLE WILLIAMS.

STATE OF MARYLAND,
City of Baltimore, ss:

Be it remembered that, on this 11th day of April, in the year eighteen hundred and sixty-two, before me, the undersigned, Dalrymple Williams, a commissioner, resident in the city of Baltimore, duly commissioned and qualified by the executive authority, and under the laws of the State of Pennsylvania, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared William W. Dallas and Louise S. Dallas, his wife, to me personally known to be the individuals named in and who executed the foregoing assignment of the within
9 bond, and they, in due form, of law severally acknowledged the foregoing assignment to be their act and deed, and desired that the same might be recorded as such; and the said Louise Dallas being of full age, and being by me examined separate and apart from her said husband, and the contents of the foregoing bond and assignment being first made fully known to her, declared that she did voluntarily and of her own free will and accord seal, and as her act and deed deliver, the said assignment without any coercion or compulsion of her said husband.

DALRYMPLE WILLIAMS, MARYLAND, COMMISSIONER FOR THE STATE OF PENNSYLVANIA, BALTIMORE CITY.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

DALRYMPLE WILLIAMS,
Commissioner for Pennsylvania in Maryland

10 *Narr.*

In the court of common pleas of Sept. T., 1870.

ALLEGHENY COUNTY, *ss.*

James B. Murray, late of said county, yeoman, was summoned to answer Jane S. Dallas, assignee of William W. Dallas and Louise S. Dallas, his wife, of a plea of debt, &c.

Whereupon the said Jane, by James Veech, her attorney, complains: For that heretofore, to wit, on the 27th day of April, A. D. 1860, at the county aforesaid, the said James, by his writing obligatory, with his seal sealed, and to the court here shown, the date whereof is the day and year aforesaid, acknowledged himself held and firmly bound unto the said Louise S. Dallas in the sum of fourteen thousand dollars to be paid to the said Louise, subject to the condition of, and to be discharged upon, payment by said James to said Louise of seven thousand four hundred dollars, on the first day of July, A. D. 1870, with interest at six per cent. per annum, payable half yearly from July 1st, 1860, which said bond has by the said Louise S. Dallas and William W. Dallas, her husband, duly assigned to the said Jane S. Dallas, as per copies of
11 said bond, assignment, &c., hereto annexed. And said Jane saith that although said James has duly paid the interest payable on said sum of 7,400 dollars up to January 1st, 1871, yet he has wholly neglected and refused to pay the said principal sum of 7,400 dollars, and its interest from January 1st, 1870, according to the tenor of said condition, whereby action hath accrued to said Jane to have and demand the same from said James, and she doth demand the same in the lawful gold and silver coins of the United States of America, in lawful proportions, which the said James, has neglected and refused to pay, to the damage of the said Jane, three thousand dollars, and therefore she brings her suit, &c.

JOHN DOE,
RICH'D ROE,
Pledge, &c.

12 (Endorsement:) No. 407. Sept. term, 1870. Jane S. Dallas, assignee, &c., vs. James B. Murray. Precipe, affidavit, copies and narr. Iss. July 11, 1870. V. W. & V.

13 *Summons*

THE COMMONWEALTH OF PENNSYLVANIA,
Allegheny County, ss:

To the sheriff of said county greeting:

We command you that you summon James B. Murray, so that he be and appear before our court of common pleas to be holden at the city of Pittsburgh, in and for the said county, on the first Monday of August next, there to answer Jane S. Dallas, assignee of William W. Dallas and Louise S. Dallas, his wife, of a plea of debt.

And have you then there this writ. Witness the Hon. James P. Sterrett, president judge of our said court, the 11th day of July, A. D. one thousand eight hundred and seventy.

JACOB H. WALTER,
Prothonotary.

14 (Endorsement:) No. 407. Sept. term, 1870. Jane S. Dallas, assignee vs. James B. Murray. Summons in debt to 1st Monday of August, 1870.

Served July 12, 1870, by delivering to James B. Murray a true and attested copy of this writ, and by making known to him the contents thereof. So answers—

HUGH S. FLEMING,
Sheriff.

Sheriff F. $1 50. R. H. Fife. 248.

V., W. & V.,
Atty's for Pl'ff.

15 *Aff't of defence.*

No. 407. Sept. term, 1870.

JANE S. DALLAS, ASSIGNEE OF WILLIAM W. Dallas and Louise S. Dallas, his wife,
v.
JAMES B. MURRAY. } *Debt.*

ALLEGHENY COUNTY, *ss:*

James B. Murray, the above defendant, having been duly sworn, says that, as he verily believes, he hath a just defence to the plaintiff's action in this, to wit, that, on the 8th day of July, 1870, this affiant duly tendered to the said Jane S. Dallas, through her attorney and agent, in that behalf, David H. Veech, esq., the sum of seven thousand four hundred dollars with interest from the first day of January, 1870, to the date of said tender; such tender being in United States legal tender notes, made such legal tender by virtue of the act of Congress of February 25, 1862, which tender was declined. That this affiant, since
16 said tender, has been ready, and willing, and now is ready and willing to pay the amount of said bond with its interest from the 1st day of January, 1870, to 8th day of July, 1870, in legal tender notes as aforesaid.

And further this defendant objects that the action should have been brought in the name of the obligees in the bond, and submits to the judgment of this court whether the said Jane S. Dallas can maintain an action on this bond in her own name.

JA'S B. MURRAY.

Affirmed & subscribed this 25th July, 1870, before me.
JACOB H. WALTER,
Pro.

(Endorsement.) No. 407. Sept. term, 1870. Dallas vs. Murray. Affidavit of defence. Filed July 25, 1870. Acheson.

17 *Notice of rule, &c.*

In the court of com. pleas of Allegheny Co. No. 407. Sept. T., 1870.

JANE S. DALLAS, ASSIGNEE, &C.,
v.
JAMES B. MURRAY.

The defendant is hereby notified that the plaintiff has entered a rule

on him to show cause why judgment, as claimed in plaintiff's affidavit and narr., should not be entered for want of a sufficient affidavit of defence, as per specification filed, and we will ask the same to be called for argument during the sitting of the court on Saturday, August 13, 1870, or as soon thereafter as the court will allow us to be heard.

To the defendant or his attorney.

VEECH, WATSON & VEECH,
Att'ys for Pl'ff.

AUGUST 2, 1870.

18 ALLEGHENY COUNTY, *ss:*

David H. Veech, on his solemn oath, deposeth and saith that, on Thursday, Aug. 4, 1870, he served on James B. Murray, the defendant within named, a copy of the within notice.

DAVID H. VEECH.

Subscribed & sworn this 4th day of August, before—
JACOB H. WALTERS, *Pro.*

V., W. & V.

(Endorsement:) No. 407. September term, 1870. Dallas vs. Murray. Filed Aug. 4, 1870. Notice of rule. Service accepted Aug., 1870.

19 *Rule, &c., for judgm't.*

In the court of com. pleas of Allegheny Co., of Sept. term, 1870. No. 407.

JANE S. DALLAS, ASSIGNEE, &C., }
vs.
JAMES B. MURRAY. }

And now, to wit, Aug. 1, 1870, the pl'ff enters a rule on def't to show cause why judgment, as claimed in pl'ff's affidavit and narr., should not be entered for want of sufficient affidavit of defence, and specified that defendant's said affidavit of defence is insufficient in that the alleged tender, being in U. S. "legal tender notes," and the bond sued on being made in A. D. 1860 for $7,400 "dollars," & interest from Jan'y 1, 1870, such tender is unavailing under the constitutions and laws of the United States and of the State of Pennsylvania, & the notes such as pl'ff is not bound to receive in payment, and such as def't had notice that plaintiff's attorneys were instructed not to receive, unless at the current discount below gold.

20 The action is rightly brought in the name of Jane S. Dallas, assignee, &c., as set forth in pl'ff's affidavit of claim—not denied—according to sections 1, 2, 3, & 8 of act of assembly of May 28, 1715. Purdon, p. 112.

VEECH, WATSON & VEECH,
Pl'ff's Att'ys.

(Endorsement:) No. 407. Sept. T., 1870. Dallas vs. Murray. Rule, &c., for judgment, sec. req. non obdante, aff. of defence. Filed Aug. 4, 1870. V., W. & V.

21 *Precipe for judgment.*

In the com. pleas of Allgheny Co. No. 407. Sept. T,, 1870.

DALLAS *vs.* MURRAY.

August 27, 1870. The proth'y will enter judgment for pl'ff under order of court, on rule to show cause, &c., for the sum of seven thousand six hundred and ninety-three & $\frac{53}{100}$ dollars, with interest from this date, payable in gold and silver coins of the U. S., according to law.

VEECH, WATSON & VEECH,
Pl'ff's Att'ys.

To J. H. WALTERS, Esq.,
Proth'y.

AUG. 27, 1870.

(Endorsement:) No. 407. Sept. T., 1870. Precipe for entry of judg't. $7,693 53. Aug. 27, 1870. Filed Aug. 27, 1870. V., W. & V.

22 *Writ of error from sup. c't of Pa.*

WESTERN DISTRICT OF PENNSYLVANIA, *sct*:

The Commonwealth of Pennsylvania to the judges of the court of common pleas for the county of Allegheny, greeting:

SEAL OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT. 1776.

Because, in the record and process and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between Jane S. Dallas, assignee of W'm W. Dallas & wife, pl'ff, and James B. Murray, def't, No. 407, Sept. term, 1870, as it is said, manifest error hath intervened, to the great damage of the said def't, as by complaint of the same def't we have received information; we, willing that, if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seal, distinctly and openly you have before the judges of the supreme court of the said Commonwealth, at a supreme court to be held at Pittsburgh, in and for the western district of the said Commonwealth, on the 5th Monday of Oct'r next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our customs ought.

Witness the honorable James Thompson, LL. D., chief justice of our said supreme court, at Pittsburgh, the 31st day of August, in the year of our Lord one thousand eight hundred and 70, and of the Commonwealth the ninety-fifth.

Allowed by—

THO'S J. KEENAN,
Prothonotary of Western District.

23 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

To the honorable the judges of the supreme court:

The record and process within mentioned, with all things touching

the same, before the judges within named, at the day and place within. contained in a certain record to this writ annexed, we do certify and send as within we are commanded.

JAMES P. STERRETT.

(Indorsed:) No. 407. Sept. term, 1870. No. 161, Oct. and Nov term, 1870. James B. Murray, pl'ff in error, def't below, vs. Jane S. Dallas, ass'nee, &c. Writ of error to the com. pleas of Allegheny Co.

Precipe, affidavit, and recog. filed and writ issued Aug. 31, '70.

"Rule to appear and plead at return of writ."

N. B.—20 days' notice to the party or her counsel below, will be necessary to compel an attendance.

THO'S J. KEENAN,
Pro. W. D.

Oct. 24, '70. Ret'd.

Filed Sep. 2, 1870. Acheson, att'y for P. in E. $6, pl'ff in error paid.

24 No. 161. October and Nov. term, 1870. In the supreme court of Pa., western dist.

JAMES B. MURRAY, PL'FF IN ERROR,
v.
JANE S. DALLAS, ASSIGNEE OF W'M W. DALLAS and Louise, his wife, def't in error.

Specifications of error.

First specification of error. The court erred in entering judgment against the defendant for want of a sufficient affidavit of defence for $7,693 53 and costs.

Second specification of error. The court erred in entering judgment against the defendant for $7,693 53, payable in gold and silver coin of the United States.

Third specification of error. The court erred in adjudging the defendant's affidavit of defence to be insufficient, and if the plaintiff was entitled to judgment at all, it should have been a judgment payable in lawful money of the United States.

(Signed) M. W. ACHESON,
Att'y for P. in E.

(Endorsement:) No. 161. Oct. and Nov. T., 1870. In sup. c't of Penn'a, W. D. James B. Murray, pl'ff in error, v. Jane S. Dallas, def't in error. Specifications of error. Filed Oct. 24, 1870. Acheson.

25 *Opinion of sup. c't of Penn'a.*

Supreme court of Pennsylvania, west'n dist. Error to the com. pleas of Allegheny County, at No. 407, Sept. T., 1870.

JAMES B. MURRAY
v.
JANE S. DALLAS, ASSIGNEE.

Per cur.

The principle involved in this case is ruled by the case of Rankin vs.

Demott, 11 P. F. Smith, 263, which followed the lead of the decisions of the Supreme Court of the United States in Williard v. Taylor, 8 Wall., 557, and Hepburn v. Griswold, 8 ib., 603; and as the ruling of the court below is fully in accord with those cases, the judgment is to be affirmed.

Judgment affirmed.

A true copy of the opinion filed in my office in above-stated case, at No. 161, Oct. & Nov. T., 1870, on Nov. 14, 1870.

Attest my hand & official seal at Pittsburgh, west'n dist. of Penn'a, Nov. 30, 1870.

[SEAL.] THO'S J. KEENAN,
Pro. S. C. W. D.

To the Honorable W'm Strong, associate justice of the United States Supreme Court:

The petition of James B. Murray respectfully represents that, lately, to wit, on the 14th day of November, A. D. 1870, in a certain suit depending in the supreme court of Pennsylvania, wherein your petitioner was plaintiff in error, and Jane S. Dallas was defendant in error, said suit being No. 161, of October and November T., 1870, of said court, final judgment was rendered against your petitioner, affirming a judgment for "seven thousand six hundred and ninety-three $\frac{53}{100}$ dollars, payable in gold and silver coin of the U. S.," which the court of common pleas of the county of Allegheny, in the State of Pennsylvania, had rendered against your petitioner on the 27th day of August, A. D. 1870; that the said suit was an action of debt brought by the said Jane S. Dallas against your petitioner upon his bond, bearing date the 27th day of April, A. D. 1860, the condition of which bond being in the words following,

27 to wit: "The condition of the above obligation is such, that if the above-bounden James B. Murray, his heirs, executors, administrators, and assigns, do well and truly pay, or cause to be paid, unto the said Louise S. Dallas, her certain attorneys, heirs, executors, administrators, or assigns, the sum of seven thousand four hundred dollars, on the first day of July, anno Domini eighteen hundred and seventy, with interest thereon from the first day of July, A. D. eighteen hundred and sixty, at six per cent. per annum, payable half yearly, without any fraud or further delay, then this obligation to be void; otherwise to be and remain in full force and virtue."

That the said supreme court of Pennsylvania is the highest court of law or equity of said State in which a decision in said suit could be had; that, in said recited suit, there was drawn in question the validity of a statute of the United States, to wit, the act of Congress of February 25th, 1862, authorizing the issue of United States Treasury notes, and making the same lawful money and a legal tender in payment of all debts, public and private, except duties on imports and interest on United States bonds and notes; and the decision of the supreme court of Penn-

28 sylvania in said suit was against the validity of said statute, and was adverse to the rights of your petitioner, as claimed by him in said suit, under the provisions of said recited act of Congress, and that it so appears of record in the suit aforesaid.

Therefore your petitioner claims that he is wronged, and he prays that a writ of error may issue from the Supreme Court of the United States to the said supreme court of Pennsylvania to bring up the record in said suit to the end that justice may be done to your petitioner, who further saith that the writ of error now prayed for is not intended for delay.

Your petitioner presents herewith his bond in the penal sum of eigh-

teen thousand dollars, and further saith that he himself is a freeholder, and worth more than the penalty of the bond, exclusive of his debts and all legal exemptions, and that the sureties in said bond, viz., William M. Lyon and William K. Nimmick, are each unincumbered freeholders, and worth, as affiant verily believes, each, more than the penalty
29 of said bond, exclusive of their debts and all legal exemptions.

JA'S B. MURRAY.

UNITED STATES OF AMERICA,
Western District of Penn'a, ss:

Before me, H. D. Gamble, United States commissioner in and for the western district of Pennsylvania, on this 16th day of November, A. D. 1870, personally appeared the above-named petitioner, James B. Murray, who, having been duly sworn, says that *that* the facts set forth in the foregoing petition are correct and true as he verily believes.

JA'S B. MURRAY.

Subscribed and affirmed this 16th Nov'r 1870, before me.

H. D. GAMBLE, *U. S. Com'r.*

30 (Indorsed: Petition. Murray v. Dallas.

Writ of error allowed.

W. STRONG,
Ass. Jus. S. C. U. S.

Nov. 18, 1870.
Nov. 19, 1870. Filed.

31 *Copy of bond.*

Know all men by these presents that we, James B. Murray, William M. Lyon, and William K. Nimick, are held and firmly bound unto Jane S. Dallas in the full and just sum of eighteen thousand dollars, to be paid to the said Jane S. Dallas, certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 16th day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, to wit, on the 14th day of November, A. D. 1870, in a certain suit depending in the supreme court of the State of Pennsylvania, wherein the above-bounden James B. Murray was plaintiff in error, and the said Jane S. Dallas was defendant in error, a final judgment was rendered by said court against the said James B. Murray, affirming a judgment rendered against the said James B. Murray by the court of common pleas of the county of Alleghany, and State of Pennsylvania, in No. 407 of September term, 1870; and whereas the said James B. Murray hath applied to one of the justices of the Supreme Court of the United States for a writ of error to the supreme court of Pennsylvania to reverse the said judgment of said court:

Now the condition of the above obligation is such that, if the said James B. Murray shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) JAMES B. MURRAY. [L. S.]
(S'g'd) W'M M. LYON. [L. S.]
(S'g'd) WILLIAM K. NIMICK. [L. S.]

Sealed and delivered in presence of—
(S'g'd) BEVERLY JONES.
(S'g'd) SAM'L B. EWING.
(S'g'd) J. D. SCULLY.

Approved by—

(Indorsed:) Copy of bond. Murray v. Dallas.

Nov. 18, 1870, bond & sureties approved.
(Signed) W. STRONG,
Ass. J. U. S. S. C.

Filed Nov. 19, 1870.

32 *Citation.*

The United States of America to Jane S. Dallas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein James B. Murray is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment, rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, Associate Justice of the Supreme Court of the United States, this 18th day of November, in the year of our Lord one thousand eight hundred and seventy.

W. STRONG,
A. J. S. C. U. S.

33 (Indorsed:) Citation. James B. Murray, pl'ff in error, v. Jane S. Dallas, def't in error.

November 21st, 1870, personal service on Jane S. Dallas waived, and service accepted for her.

JA'S VEECH,
Her Att'y.

Filed Nov. 19, 1870.

34 *Writ of error from U. S. S. C.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James B. Murray, plaintiff in error, and Jane S. Dallas, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the

35 United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said James B. Murray, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

W. STRONG,
A. J. S. C. U. S.

Filed Nov. 19, 1870.

36 Supreme court of Penn'a, west'n dist. No. 161 Oct. & Nov. term, 1870. Error to the court of com. pleas of Allegheny County, at No. 407 Sept. term, 1870.

JAMES B. MURRAY, PL'FF IN ERROR,
vs.
JANE S. DALLAS.

I, Tho's J, Keenan, proth'y of the supreme court of Pennsylvania, western district, do hereby certify that the foregoing thirty-five pages hereto annexed contain a full and true copy of the record and specifications of error and opinion of said supreme court, and bond in writ of error from U. S. Supreme Court, as same are on file in my office in above-entitled case, and also the original petition, citation, and writ of error from U. S. Supreme Court.

Attest my hand and official seal, at Pittsburgh, in the western district, this 30th day of Nov., A. D. 1870.

[SEAL.]

THO'S J. KEENAN,
Pro. Sup. C't of Penna., W. D.

(Indorsed:) No. 161 Oct. & Nov. T., 1870, in sup. c't of Penna., W. D. James B. Murray vs. Jane S. Dallas. Copy of record, &c.

(Indorsement on cover:) No. 350. James B. Murray, plaintiff in error, vs. Jane S. Dallas. Pennsylvania supreme court. Filed 7th December, 1870.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1871.

JAMES B. MURRAY,
PLAINTIFF IN ERROR,

vs.

JANE S. DALLAS,
DEFENDANT IN ERROR.

No. 149.

BRIEF OF ARGUMENT, &c., FOR PLAINTIFF IN ERROR.

PITTSBURGH:
A. ANDERSON & SONS, STEAM BOOK AND JOB PRINTERS, 67 AND 69 FIFTH AVENUE.
1872.

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IN THE

Supreme Court of the United States,

DECEMBER TERM, 1871.

JAMES B. MURRAY,
Plaintiff in Error,

vs.

JANE S. DALLAS,
Defendant in Error.

No. 149.

Error to the Supreme Court of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

This was an action of debt, brought July 11th, 1870, in the Court of Common Pleas of Allegheny county, in the State of Pennsylvania, by Jane S. Dallas, assignee of William W. Dallas and Louise S. Dallas, his wife, against James B. Murray.

The action was on a bond of James B. Murray to William W. Dallas and wife, bearing date April 27th, 1860, in the penal sum of $14,000, conditioned "for the payment of the sum of $7,400 on the first day of July, A. D. 1870, with interest thereon from the first day of July, A. D. 1860."

The interest had been paid up to January 1, 1870.

Prior to the bringing of the action, to wit, on the 8th day of July, 1870, the defendant below, James B. Murray, duly tendered to the agent in that behalf of the plaintiff below, Jane S. Dallas, the whole amount of the real debt of said bond, with all arrears of interest, in United States legal tender notes, made such legal tender by virtue of the Act of Congress of February 25th, 1862. This tender was declined.

The plaintiff filed with her præcipe an affidavit of claim for the amount of the real debt of the said bond and interest from January 1, 1870, in gold and silver coin of the United States of America.

On the 25th of July, 1870, the defendant appeared to the action and filed an affidavit of defence, setting forth the above mentioned tender and refusal.

August 1, 1870, the plaintiff entered a rule for judgment for want of a sufficient affidavit of defence, "in that the alleged tender being in United States '*Legal Tender notes*,' and the bond sued on being made in A. D. 1860, for $7,400 '*Dollars*,' and interest from January 1st, 1870, such tender is unavailing under the Constitution and laws of the United States," &c.

August 27th, 1870, the said Court of Common Pleas made the rule for judgment absolute and on the same day entered judgment for the plaintiff for $7,693.$\frac{53}{100}$, "payable in gold and silver coin of the United States, and costs."

To that judgment the defendant, James B. Murray, sued out a writ of error to the Supreme Court of Pennsylvania, being the highest Court of Law and Equity of said State, to No. 161 October and November Term, 1870.

November 14th, 1870, the Supreme Court of Pennsylvania rendered final judgment in said cause affirming the said judgment of the Court of Common Pleas.

Affidavit of Claim.

State of Pennsylvania, }
City of Philadelphia, } ss.

George M. Dallas, agent in this behalf of Mrs. Jane S. Dallas, on his solemn oath, deposeth and saith, that James B. Murray of the city of Pittsburgh, Pa., is justly indebted to said Mrs. Jane S. Dallas in the sum of seven thousand and four hundred dollars, with lawful interest thereon from the first day of January, A. D. 1870, in, as deponent is advised, the gold and silver coins of the United States of America, of the weight and fineness, and in the proportions of each of said kinds of coin fixed by the laws of said United States,—said indebtedness being for the principal sum and interest from January 1, 1870, (up to which date the interest has been paid,) due and unpaid on said James B. Murray's bond bearing date and made on the 27th day of April, A. D. 1860, to said Louise S. Dallas, in the sum of fourteen thousand dollars, conditioned to pay to her seven thousand four hundred dollars on the first day of July, A. D. 1870, with interest thereon from the first day of July, A. D. 1860, at six per cent. per annum, payaple half yearly, which bond was, by the said Louise S. Dallas and said W. W. Dallas, her husband, by writing indorsed thereon, dated March 29th, A. D. 1862, under their hands and seals, before three credible witnesses, duly assigned to said Jane S. Dallas; and said assignment was by them duly acknowledged on April 11th, 1862; of which bond, condition, assignment and acknowledgment, true copies are hereto annexed, and intended to be herewith filed.

Sworn to and subscribed this 9th day of July, A. D. 1870, before me, an Alderman in and for said city.

J. P. Delaney.

GEO. M. DALLAS.

Copy of Bond.

Know all men by these presents, That I, James B. Murray, of the City of Pittsburgh, State of Pennsylvania, am held and firmly bound unto Louise S. Dallas, of Carroll County, Maryland, in the sum of fourteen thousand dollars, to be paid to the said Louise S. Dallas, her certain attorney, heirs, executors, administrators or assigns; to which payment, well and truly to be made, I do bind myself, my heirs, executors and administrators, and every of them, firmly by these presents.

Witness my hand and seal the twenty-seventh day of April, in the year of our Lord, one thousand eight hundred and sixty.

The condition of the above obligation is such, That if the above bounden, James B. Murray, his heirs, executors, administrators and assigns, do well and truly pay or cause to be paid unto the said Louise S. Dallas, her certain attorneys, heirs, executors, administrators or assigns, the sum of seven thousand four hundred dollars on the first day of July, Anno Domini eighteen hundred and seventy, with interest thereon from the first day of July, A. D. eighteen hundred and sixty, at six per cent. per annum, payable half yearly, without any fraud or further delay, then this obligation to be void, otherwise to be and remain in full force and virtue.

JAMES B. MURRAY. [seal.]

Sealed and delivered in presence of

Wm. M. Lyon.

AFFIDAVIT OF DEFENCE.

ALLEGHENY COUNTY, *ss.*

James B. Murray, the above defendant, having duly been sworn, says that as he very believes, he hath a just defence to the plaintiff's action in this, to wit: that on the 8th day of July, 1870, this affiant tendered to the said Jane S. Dallas, through her attorney and agent in that behalf, David H. Veech, Esq., the sum of seven thousand four hundred dollars, with interest from the first day of January, 1870, to the date of said tender; such tender being in United States legal tender notes, made such legal tender by virtue of the Act of Congress of February 25th, 1862, which tender was declined. That this affiant since said tender has been ready and willing, and now is ready and willing to pay the amount of said bond with its interest from the first day of January, 1870, to 8th day of July, 1870, in legal tender notes as aforesaid. And further, this defendant objects that this action should have been brought in the name of the obligees in the bond, and submits to the judgment of this Court whether the said Jane S. Dallas can maintain an action on said bond in her own name.

JAS. B. MURRAY.

Affirmed and subscribed this 25th July, 1870, before me

JACOB H. WALTER, *Proth'y.*

RULE FOR JUDGMENT.

And now, to wit, August 1st, 1870, the plaintiff enters a rule on defendant to show cause why judgment, as claimed in plaintiff's affidavit and *narr.*, should not be entered for want of sufficient affidavit of defence, and specifies that

the defendant's said affidavit of defence is insufficient, in that the alleged tender being in U. S. "legal tender notes," and the bond sued on being made in A. D. 1860, for $7,400 "Dollars," and interest from January 1st, 1870, such tender is unavailing under the Constitution and Laws of the United States and of the State of Pennsylvania, and *the notes* such as plaintiff is not bound to receive in payment, and such as defendant had notice that plaintiff's attorneys were instructed not to receive, unless at the current discount below gold.

The action is rightly brought in the name of Jane S. Dallas, assignee, &c., as set forth in plaintiff's affidavit of claim,—not denied—according to section 1, 2, 3 and 8, of Act of Assembly of May 28, 1715, Purdon, p. 112.

JUDGMENT OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY.

August 27th, 1870, rule absolute, and judgment against the defendant for want of a sufficient affidavit of defence for seven thousand six hundred and ninety-three dollars and fifty-three cents, payable in gold and silver coin of the United States and costs.

OPINION AND JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

NOVEMBER, 14, 1870.

Per Curiam. The principle involved in this case is ruled by the case of Rankin vs. Demott, 11 P. F. Smith, 263, which followed the lead of the decisions of the Supreme Court of the United States in Williard vs. Taylor, 8 Wall., 557, and Hepburn vs. Griswold, 8 *ib.*, 603; and as the ruling of the Court below is fully in accord with those cases, the judgment is to be affirmed.

Judgment affirmed.

SPECIFICATIONS OF ERROR

TO THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

1. The Court below (the Supreme Court of Pennsylvania) erred in affirming the judgment of the Court of Common Pleas of Allegheny county in said State.

2. The Court erred in not reversing the judgment of the said Court of Common Pleas of Allegheny county.

3. The Court erred in deciding that the tender in United States legal tender notes as set forth in the affidavit of defence, was unavailing under the Constitu[illegible] laws of the United States.

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the defendant's said affidavit of defence is insufficient, in that the alleged tender being in U. S. "legal tender notes," and the bond sued on being made in A. D. 1860, for $7,400 "Dollars," and interest from January 1st, 1870, such tender is unavailing under the Constitution and Laws of the United States and of the State of Pennsylvania, and *the notes* such as plaintiff is not bound to receive in payment, and such as defendant had notice that plaintiff's attorneys were instructed not to receive, unless at the current discount below gold.

The action is rightly brought in the name of Jane S. Dallas, assignee, &c., as set forth in plaintiff's affidavit of claim,—not denied—according to section 1, 2, 3 and 8, of Act of Assembly of May 28, 1715, Purdon, p. 112.

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1. The Court below (the Supreme Court of Pennsylvania) erred in affirming the judgment of the Court of Common Pleas of Allegheny county in said State.

2. The Court erred in not reversing the judgment of the said Court of Common Pleas of Allegheny county.

3. The Court erred in deciding that the tender in United States legal tender notes as set forth in the affidavit of defence, was unavailing under the Constitution and laws of the United States.

Over

ARGUMENT FOR PLAINTIFF IN ERROR.

The bond sued on in this case, it will be perceived, is not in terms payable in gold or silver coin, but is an ordinary obligation in the penal "sum of fourteen thousand dollars," conditioned for the payment of "the sum of seven thousand four hundred dollars on the first day of July, A. D. 1870."

In holding that this debt was not solvable by United States legal tender notes, and that the tender set forth in the affidavit of defence was therefore unavailing, the Court of Common Pleas of Allegheny county, Pennsylvania and the Supreme Court of that State, followed the case of HEPBURN v. GRISWOLD, 8 Wallace, 603.

The decision of the Supreme Court of Pennsylvania was made before the Supreme Court of the United States had overruled the case of HEPBURN v. GRISWOLD, in so far as it was there held that the legal tender Acts of Congress were unconstitutional as applied to debts created before their enactment.

It being now definitely settled by this Court in KNOX v. LEE and PARKER v. DAVIS, (Philadelphia *Legal Intelligencer*, vol. XXIX, page 36) that the legal tender Acts of Congress are constitutional as applied to contracts made either before or after their passage—nothing remains (it would seem) for this plaintiff in error to do but to refer to those cases and ask for a reversal of the judgment.

But it is understood that the defendant in error will request this Court to enter final judgment in the case. This, it is submitted, would not be according to the practice in such cases. In LAUGHLIN v. HARVEY, 2 P. F. Smith, (Pa.) 30 and 99, where judgment, for want of a sufficient affidavit of defence, was entered by the Court of original jurisdiction

(the affidavit there as here setting up *a tender*), the Supreme Court of Pennsylvania holding the tender good, simply reversed the judgment and awarded a *procedendo*. This would seem to be the practice most likely to lead to a correct final judgment touching interest and costs.

Should this Court, however, entertain a different view from that above expressed, and proceed to render a final judgment in the case, we ask that it shall be *without interest from date of tender and without costs to the plaintiff* in the action.

The tender set forth in the affidavit of defence was an actual and complete tender, and being refused, stopped interest and relieved the debtor from the costs of the subsequent suit. Broom's Legal Maxims, *260; Tremlett v. Adams, 13 Howard, 295, 307; Pennsylvania Statute of 1705, Pur. 331, pl. 2.

The tender went to the plaintiff's *right of action*, (Pa. Company for Insurance v. Dovey, 14 P. F. Smith, 261), *was a complete defence*, (2 Bouvier's Law Dic., title Tender subdivision 8) and was *pleadable in bar to the suit*. (Wheeler v. Woodward, 16 P. F. Smith, 158).

It has indeed been held in Pennsylvania that a *plea* of tender must be supported by bringing the money into Court. Sheredine v. Gaul, 2 Dal., 190.

The reason for this is, that if there should be a verdict for the defendant and the money not paid into Court the plaintiff would be without his money and the defendant discharged from the plaintiff's demand. *Ibid.*

But in the present case the defendant, Murray, was not called on to plead. The cause never reached the stage when it became incumbent on him to file a plea and pay the money into Court. Under the rule of the Court of Common Pleas (which requires the defendant to state under oath what his defence to the action is,) he filed *an affidavit*

of defence. Without ruling him to file a *plea,* the plaintiff in the action immediately took a rule for judgment for want of a sufficient affidavit of defence, on the ground that the tender being in legal tender notes, and not in coin, *was a nullity.* The Court upon the hearing of the rule decided the affidavit of defence insufficient on said ground, and holding that the tender was unavailing and no defence shown, gave a judgment for plaintiff payable in gold and silver.

It never has been decided in Pennsylvania, or elsewhere, and we are confident it never will be, that an affidavit of defence must be supported by bringing the money into Court at the time the affidavit of defence is filed. There is no rule of court and no rule of practice requiring any such thing. An *affidavit of defence* and a *plea* are two totally different things, and their functions distinct. The object of the affidavit of defence is that it may appear at an early stage of the case by the oath of the defendant whether he really hath any defence, and what it is. But the purpose of a plea is to put the cause at issue with a view to its final determination.

The rule of court under which judgment was entered in this case is published at the end of this argument. It will appear by reference thereto that it does not require the payment into court of the money upon a defence of tender, set forth in such affidavit, but merely that the defendant shall state specifically under oath the nature and character of his defence. This was done in this case.

That the defendant, Murray, was not bound to pay the money into Court until he filed a formal *plea* of tender clearly appears from the cases of THOMPSON VS. MCKINLEY, 11 Wright, 353, and WHEELER V. WOODWARD, 16 P. F. Smith, 158.

THOMPSON V. MCKINLEY, *supra,* was an equitable action of ejectment to enforce the payment of purchase money.

It was there held that a tender, made previously to the suit, relieved from the payment of interest, and that it was in time to pay the money into Court *at the trial.* The Court say that the *plea of tender*, not being appropriate to ejectment, it was not proper to plead the tender, and *therefore* not necessary to pay the money into Court until the trial. *Ibid* 356.

In Wheeler v. Woodward, *supra*, it was held that it was in time to pay in the money at the trial before arbitrators under a compulsory rule of reference.

In fine, all the cases show that it is not necessary or proper to pay the money into Court until the defendant is called on to file a formal *plea*, when, if he pleads tender, he should support the plea by paying the money into Court under a rule obtained for that purpose. That is the English practice, *vide* 3 Stephens, N. P. 2599 *et seq.*

WILLIAM BAKEWELL,
Attorney for Plaintiff in Error.

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It never has been decided in Pennsylvania, or elsewhere, and we are confident it never will be, that an affidavit of defence must be supported by bringing the money into Court at the time the affidavit of defence is filed. There is no rule of court and no rule of practice requiring any such thing. An *affidavit of defence* and a *plea* are two totally different things, and their functions distinct. The object of the affidavit of defence is that it may appear at an early stage of the case by the oath of the defendant whether he really hath any defence, and what it is. But the purpose of a plea is to put the cause at issue with a view to its final determination.

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WILLIAM BAKEWELL,
Attorney for Plaintiff in Error.

over

RULE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY.

No. 8. "In actions on recognizances, judgments and other records, mortgages, mechanics' liens, policies of insurance, book accounts, bills, notes, bonds, and other instruments of writing for the payment of money, and in all actions on contracts for the payment of money, whether the same be in writing or not, if the plaintiff shall file with his precipe an affidavit, stating the amount he verily believes to be due from the defendant, and a copy of the book entries, instrument of writing, record or claim, and a statement of the contract—if the same be not in writing—he shall be entitled to judgment at any time after the return day and ten days service of the writ, unless the defendant shall have filed an affidavit of defence, stating therein specifically and at length, the nature and character of the same."

IN THE

Supreme Court of the United States.

No. 149 December Term, 1871.

[Entered to No. 350 December Term, 1870.]

JAMES B. MURRAY, Plaintiff in Error,

vs.

JANE S. DALLAS, Assignee, &c., Defendant in Error.

Paper Book of Defendant in Error.

JAMES VEECH,
Attorney for Defendant in Error.

PRINTED BY BAKEWELL & MARTHENS, PITTSBURGH.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

[Entered to No. 350, December Term, 1870.]

JAMES B. MURRAY, Plaintiff in Error,
vs.
JANE S. DALLAS, Assignee, &c., Defendant in Error. } No. 149.

In Error to the Supreme Court of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR.

Without having had opportunity to see the Statement of the case which will be submitted by the Plaintiff in Error, the defendant's counsel submit the following

ABSTRACT OF THE CASE.

This cause originated in the Court of Common Pleas of Allegheny County, Pennsylvania, in an action of debt *sur* bond, dated April 27, 1860, made by James B. Murray to Louise S. Dallas, and by her and her husband, assigned to Mrs. Jane S. Dallas, in the penal sum of $14,000, conditioned to pay $7,400 on July 1, 1870, with interest semi-annually, which was paid up to January 1, 1870.

Under rules of practice of that Court, the plaintiff below filed with her *precipe* copies of the bond and assignment, and an *Affidavit of Claim*, wherein she claimed to recover $7,000, with interest (at six per cent. per annum) from January 1, 1870, in *gold* and *silver coin* of the United States, in the lawful proportions. (Record, p. 2.) And the same claim is asserted in her *Narr.* (Record, p. 4.)

The defendant below, having appeared to the action, filed his *Affidavit of Defence*, wherein he sets forth that on July 8th, 1870, (before suit brought) he tendered to plaintiff's attorney $7,400, and interest from Jan. 1 to July 8, 1870, in U. S. *legal tender notes*, made such by Act of Congress of Feb. 25, 1862, which tender was declined; and averring that *ever since* such tender he has been and then was ready and willing so to pay said debt and interest. (Record, p. 5.)

The plaintiff below, deeming this an insufficient defence, according to the rules of practice of the County Court, on August 4, 1870, took a rule on defendant for judgment, as claimed, *non obstante affidavit of defence*, assigning its insufficiency to consist in that the bond having been made in A. D. 1860, payment in "legal tender notes" was not such as plaintiff was bound to accept, and such as defendant had notice that the plaintiff's attorneys were instructed not to receive, unless at the current discount below gold. (Record, p. 6.)

On argument upon this rule, the Court of Common Pleas, August 27, 1870, gave judgment for plaintiff for $7,693.53, to bear interest from that date—being the principal debt ($7,400) and interest from Jan. 1, 1870—"payable in gold and silver coin of the United States." (Record, p. 1.)

To this judgment the defendant, Murray, sued a writ of error from the Supreme Court of the State, wherein, upon the record being sent up to that Court, he assigned

for errors—1. The rendition of the judgment for the *sum* named, and *costs*;—2. Making the judgment payable in *gold and silver coin* of the United States;—and 3. That "if plaintiff was entitled to judgment at all, it should have been a judgment payable in *lawful money* of the United States." (Record, p. 8.)

The Supreme Court, after argument, *affirmed* the judgment of the Court below, Nov. 14, 1870. (Record, p. 1, and pp. 8, 9.)

To this judgment of affirmance, before a return of the record to the County Court, Mr. Murray has sued this writ of error from this Court, complaining that the judgment draws in question, and is against the validity of the legal tender Act of Congress, of Feb. 25, 1862. (Record, p. 9.)

BRIEF OF ARGUMENT.

We presume (without having seen them) that the errors assigned here cover, in effect, the errors assigned in the State Court, viz.: That the judgment is erroneous, 1st, in *amount*; 2d, in giving the plaintiff *costs*; 3d, in directing payment in *gold and silver coin*.

At the time the judgment was rendered (August, 1870) *Willard vs. Tayloe*, and *Hepburn vs. Griswold*, were the lights followed. But they have gone out; and the silver and the gold have been transformed into greenbacks. We, therefore, as in duty bound, yield the *coin*, but claim the full *tale* of interest and costs.

The designation by the County Court, of the *medium* or *kind of money* in which the judgment was to be paid, was, perhaps, an innovation upon precedents in courts of law; and the difference in value between gold and greenbacks should perhaps have been put into *damages*, or added to the amount. It followed the precedents of the

decrees in *Willard vs. Taylor* and *Hepburn vs. Griswold*, which were cases in Chancery. As the law of "legal tender notes" now is, and for the right disposal of this case, it is well that the judgment was so rendered. That caudal appendage may now be treated as surplusage.

We will, therefore, address ourselves to consider whether or not the judgment is right in other respects.

1. Although no error can be assigned here for reversal, other than "such as appears on the face of the record, and immediately respects" the question raised as to the medium of payment, under the Act of Congress of Feb. 25, 1862—according to the 25th section of the judiciary Act of September 24, 1789; yet as by the 24th section of that Act this Court can give such judgment as the Court below should have given, certain kind of cases excepted, of which this is not one; we assume that this Court will not merely affirm or reverse, but will, in its mandate to the Court below direct what shall be the amount of the judgment to be paid, and whether, with or without interest and costs.

Gelston vs. Hoyt, 3 Wheat. 335–6.

McCulloch vs. Maryland, 4 Wheat. 437.

Upon this assumption the defendant in error claims the judgment of this Court, entitling her to the whole amount of her claim, with interest and costs, payable in lawful money.

The plaintiff in error resists this claim as to *costs* and to *interest* since July 8, 1870, the date of his alleged tender.

2. The defendant in error denies that the alleged *tender* is of any avail, and should be wholly disregarded, because,

First—Not duly pleaded.

The debt was due July 1st—tender made July 8th. The affidavit of defence (Record, p. 5) avers only that "*since* said tender, he has been, and now is ready and willing to pay in legal tender notes."

A plea of tender must state that defendant was "always ready" to pay ; not from the time of the tender only, but from the time when payment should have been made. The averment of *tout temps prist* is essential to a plea of tender. Therefore, where a defendant has not paid or tendered *at the day* when due, it is no plea to say that *after* that day he tendered the money, and *from the time* of tender has been ready and willing to pay it.

Hume vs. Peploe, 8 East, 168.
Downman vs. Downman, 1 Wash. Rep. 26.
2 Greenl. Ev., 649 (9th Ed.)
2 Salk. 622, '3. Ld. Raym, 254.

Second—Not pleaded with a *profert in curia.* and the money brought into court. This is indispensable.

The old provincial Act of 1705, of Pennsylvania (Purdon's Digest, Title Defalcation) denying costs to a plaintiff who will sue after tender and refusal of all that was owing, was passed before Westminster Hall had settled the principles and practice in such cases, which is thus stated in Bacon's Abridgment, vol. 9, p. 301, Title *Tender :*—

"Whenever a tender of money is pleaded, and *the debt is not discharged by the tender and refusal*, the money may be brought into court, *without leave* of the court—nay, the money tendered *must be* brought into court. In all *other cases*, leave of the Court must be had before money can be brought into court. * * * The common law rule was introduced to supply the defect of having made a tender."

To the same import are the Pennsylvania cases in 1 Casey, 361–3 ; *ib.* 301, '2, hereafter cited.

The Supreme Court of Pennsylvania somewhat varied this rule by *Harvey vs. Hackley*, 6 Watts, 264, which decided that where there is tender and refusal before suit, and it is pleaded, and the money paid into court, but without defendant obtaining the common rule so to do, or paying the costs up to the paying in, tried, and verdict "for defendant, plaintiff to have the money, tendered, and in court"—judgment must be for defendant *without costs*—the Supreme Court (per Sergeant, J.) saying, "Had the defendant, under the plea of tender, paid the money into court, and also the costs up to that time, on the common rule, the plaintiff, by determining to proceed for more would, on a verdict finding no more due, have been liable for costs from the time of payment into court."

Granting that so far as the payment of costs up to the paying in is concerned, this ruling has been relaxed, where a tender *before suit* is relied on, there has been no relaxation of the requirement that the money be promptly paid into court, *with* or *upon* the tender being pleaded or set up as a defence.

The cases in Pennsylvania are numerous which so rule. We cite the following:

Sheridine vs. Gaul, 2 Dall. 190, '1.
Cornell vs. Green, 10 S. & R. 14.
Harvey vs. Hackley, 6 Watts, 264.
Seibert vs. Kline, 1 Barr, 38–41.
Henry vs. Raiman, 1 Casey, 361.
Williams vs. Bentley, 3 " 301, '2.

We have another Act of Assembly on the subject—Act of March 12, 1867, P. L., page 35—which relates only to tender *after* suit brought. So that we are governed still by the old Act of 1705, and the adjudications of our own Courts, already cited; and, wherein they do not apply, by the English decisions—of which a reliable summary is in *notes* to 1 Saunders' Rep. 33a to 33e.

3. The plaintiff in error will seek to parry the directness of these authorities by saying that his time to *plead* and *pay in* had not yet come.

To this we oppose the following considerations:

First—Where plaintiff files an affidavit, and copy of bond, no *Narr.* is needed to entitle to judgment for want of sufficient affidavit of defence. *Clark vs. Dotter*, 4 P. F. Smith, 215.

The power of the Court, not denied here, to enter judgment for insufficient affidavit of defence, is settled by *West vs. Simmons*, 2 Whart. 261.

The rule of the C. P. of Allegheny county requires the affidavit of defence to state "specifically, and at length, the nature and character of the defence."

Another rule provides that "when the plaintiff considers an affidavit of defence insufficient, he may enter a rule of course on the defendant to show cause why judgment should not be entered for want of a sufficient affidavit; and at the same time he shall specify in writing wherein the affidavit is insufficient. And, *at any time before the rule is called for argument* the defendant may file a supplemental affidavit, of which he must notify the plaintiff's attorney."

Another rule of the Court requires the plaintiff to notify defendant's attorney of the rule for judgment five days before it is called for argument.

With some doubt whether *this* Court can pass upon these rules, we cite them to show the *regularity* of our judgment.

We adduce them further to show, in connection with the facts appearing on the Record, (p. 1,) viz.:

"July 25, 1870, affidavit of defence filed. August 4, rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Reasons filed. Same day, proof of notice to defendant's attorney, filed.

August 27, 1870, on argument list and rule absolute. Same day, judgment, &c."
—that defendant had ample time and warning to perfect his defence and pay in the money.

Second—The plaintiff's affidavit and copy filed, irrespective of her *Narr.*, which was not needed, was a special statement of her claim—to which the affidavit of defence was a special plea—to which the rule for judgment was a demurrer—on which judgment went for the plaintiff.

Third—The affidavit of defence, or special plea, sets up the previous *tender* as a "just defence to the plaintiff's action"—(Record, p 5,) a plea in bar.

Suppose, instead of making on this an issue of law, the plaintiff had made an issue of fact, and it had been found for the defendant, or plaintiff had become nonsuit, would she thereby have lost her money?

Such must have been the consequence, if this was a "just defence to the plaintiff's action," *without* a *profert in curia* of the money tendered.

If tender be pleaded, *and* the money brought into court, plaintiff is entitled to it, let the suit end as it may.

1 Camp, 327
2 Term Rep, 645.
1 Bos. and Pul, 332.
2 " " 392.

And thereupon the verdict must be for the defendant. 10 Harris, 495.

But how, if no money in court?

Fourth—Plaintiff in error may say, you did not specify, as an objection to the affidavit of defence, that the money was not paid into court.

We reply—true. But we could not presume to know on August 4th that you would not, on or before August

27th, pay in the money, and thus make your plea available. Moreover you are now here, relying on your tender of July 8th as a defence, against costs and interest at least; and if the law of tender be as we claim it, your tender goes for nought, because not *followed up* by a payment into court. *Non constat* but that the sight of the money might have tempted us to take it. Such was the quaint old basis of the rule requiring the money to be *shown* in a tender.

Fifth—It may further be said that the judgment of the Court below was given as it was—payable in coin—for the reason that the Act of Congress of Feb. 25, 1862, did not apply to anterior contracts, which this Court now holds it does, and that is the only question here now

We reply—a judgment may be right, though the *reason* given for it may be wrong. The *reason* is no part of the *record*, which in the case at bar shows only a *judgment on the pleadings* for a given sum, viz.: $7,400, and interest from January 1st to August 27th, 1870, $293.53=$7,693 53 and costs; which judgment we claim to have been without error in *amount*; and respectfully ask that a mandate go down for the payment of that sum ($7,693 53) with interest from August 27, 1870, and costs—in "legal tender notes," or "current money," or for *dollars*—we care not which.

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